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No. 265471

THE COURT OF APPEALS, DIVISION III
IN THE STATE OF WASHINGTON

KITTITAS COUNTY and CENTRAL WASHINGTON HOME BUILDERS ASSOCIATION, et al.,

Petitioners,

v.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD et al.,

Respondents.

REPLY BRIEF OF BIAW, CENTRAL WASHINGTON HOME BUILDERS, MITCHELL F. WILLIAMS d/b/a MF WILLIAMS CONSTRUCTION CO.

Julie M. Nichols, WSBA No. 37685
Building Industry Association
of Washington
111 21St Avenue SW
Olympia, WA 98507
Telephone: (360) 352-7800
Facsimile: (360) 352-7801

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111 21ST Avenue SW
Olympia, WA 98507
Telephone (360) 352-7800

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BUILDING INDUSTRY ASSOCIATION OF WASHINGTON
111 21ST Avenue SW
Olympia, WA 98507
Telephone (360) 352-7800

I. INTRODUCTION

Appellants Central Washington Home Builders Association of Washington, the Building Industry Association of Washington and Mitchell F. Williams d/b/a MF Williams Construction Co. Inc. (collectively, "BIAW"), Intervenors/Petitioners before the Growth Management Hearings Board for Eastern Washington (hereinafter "Board") submits this Reply Brief in its appeal of the Final Decision and Order (FDO) issued by the Hearings Board on August 20, 2007, Case No. 08-1-0004c. AR 2287.

The Board ruled that a number of provisions in Kittitas County's Comprehensive Plan violated the Growth Management Act, RCW 36.70A *et seq*. Specifically, the Board ruled that Kittitas County's Comprehensive Plan violated the GMA for allowing rural densities of one home per three acres (Issue 1 of the FDO), by failing to provide a variety of rural densities (Issue 11) and by failing to revise the Cluster Platting Ordinance and Planned Unit Development Ordinance (Issue 10). See AR 2287-2373.

II. ARGUMENT

A. The Growth Board and Respondents fail to grant proper deference to Kittitas County

As KCC et al. correctly point out, the Board is entitled to deference. CC Br. at 3-4, 27. See *Lewis County v. W. Wash. Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 139 P.3d 1096 (2006). But throughout their briefing, both CTED and KCC et al. largely ignore the level of deference afforded to counties planning under the Act and instead seek to foist upon Kittitas County a development scheme that they find preferable. Likewise,

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Olympia, WA 98507
Telephone (360) 352-7800

CTED over-simplifies and under-plays the idea by stating that the idea of deference is merely a reference to the standard of review. CTED Br. p. 32.

In doing so, both Respondents ignore the structure and intent of the GMA itself. The GMA affords counties a special kind of deference. In fact, both the Washington Supreme Court and the Legislature have more than once spelled out exactly the level of deference afforded to counties. See, e.g. RCW 36.70A.320; *Quadrant Corp. v. State Growth Mgmt. Hearings Bd.*, 154 Wn.2d 224, 110 P.3d 1132 (2005); *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 190 P.3d 38 (2008).

Experts have made particular note that the GMA, from its inception, was "riddled with politically necessary omissions, internal inconsistencies, and vague language" which then led to further legislative and judicial clarification on many issues, one of them being deference. Richard Settle, *Washington's Growth Management Revolution Goes to Court*, Seattle University Law Review, 23 SEAULR 5, 8. For its part, the Legislature responded with GMA amendments affording greater discretion to counties and cities. *Id.* at 49; see, e.g., 1997 Wash. Laws §§ 1-22.

In 1997, several years after the original passage of the Act, it was perfected to include the highly deferential clearly erroneous standard and. The Legislature took the unusual step of codifying the statement of legislative intent:

> In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden

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> and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

RCW 36.70A.320. (emphasis added)

The Supreme Court has also clarified that deference to county GMA actions overrides deference that would otherwise be granted to administrative agencies: "In the face of this clear legislative directive, we now hold that deference to county planning actions that are consistent with the requirements of the GMA, supersedes deference granted to the APA and courts to administrative bodies in general." *Quadrant*, 154 Wn.2d at 238, 110 P.3d 1132. More recently, the Supreme Court stated clearly, "[g]reat deference is accorded to a local government's decisions that are 'consistent with the requirements and goals' of the GMA." *Thurston County*, 164 Wn.2d at 337, 190 P.3d 38.

In recognition that every county is different, the GMA explicitly allows local jurisdictions to consider local circumstances when establishing its pattern of rural densities. *See* RCW 36.70A.070(5)(a). Of course, as Respondents point out repeatedly, the county must provide a written record explaining how the rural element harmonizes the GMA planning goals and the requirements of the Act. *Id.*

KCC et al. and CTED allege repeatedly that Kittitas County has not fulfilled its obligation under the act. In doing so, KCC et al. and CTED ignore both the facts of the case (to be explained more fully below) and the deference afforded to the county by law.

B. The Board unquestionably applied a bright-line rule and erred in finding that 3-acre rural densities are noncompliant

KCC et al. point out that the Board agreed there is no "bright line" but *they ignore the fact that the Board then proceeded to apply one*. KCC Br., p. 9. This is exactly what took place in the *Thurston County* case. *Thurston County*, 164 Wn.2d 329, 190 P.3d 38.

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According to the Respondents and Growth Board in this case, densities allowing one home per three acres in areas zoned Rural-3 and Agriculture-3 are "urban" in nature and thus a violation of the GMA. See AR 2303. But the Court in *Thurston County* (and in other cases before it) stated clearly that such bright line rules are not allowed to be applied to Counties planning under the GMA. Both KCC et al. and CTED argue that there was no bright line rule explicitly adopted by the Board but they fail to substantively distinguish the Board's position in this case from the facts in the *Thurston County* case and *Viking Properties*.

The decisions in *Thurston County* and *Viking Properties* made clear that the GMA does not give Boards the authority to make policy or to impose "bright line" rules regarding how local governments are to comply with GMA obligations. *Thurston County*, 164 Wn.2d 329, 190 P.3d 38, *Viking Properties v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005).

The Court in *Thurston County* made clear that the way the question was framed resulted in a bright-line rule, even though the Board may not have explicitly adopted such a rule. Footnote 20 states:

> "Although the Board did not explicitly adopt a five acre bright-line rule, such a rule was implicit in its decision because of the way the issue regarding rural densities was framed. The Board framed the issue as to whether the County's comprehensive plan failed to comply with the GMA by allowing 'development at densities of greater than one unit per five acres when this board has determined that such densities fail to comply with the GMA.' *Thurston County*, 164 Wn.2d at 358, 190 P.3d 38.

As discussed in earlier briefing, the facts are identical here.

Although Respondents KCC et al. claim that the Board's ruling that "3 acre and denser rural zoning is noncompliant" is well founded, they proceed to cite extensively to

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111 21ST Avenue SW
Olympia, WA 98507
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three articles – articles they also provided the Growth Board as "authorities" – that attempt to define rural areas and rural character. But the articles have *no connection whatsoever* to the local circumstances of Kittitas County. (KCC Br. p. 11, 15-20; not listed in Table of Authorities) While these articles might provide compelling reading for those interested in local land use planning in general, they are neither convincing nor controlling as authorities on whether Kittitas County has effectively limited rural sprawl.

Finally, Respondents here clearly show their hand when it comes to bright line rules. KCC et al. state clearly in its briefing: "But 3 acre lots are rural sprawl." KCC Br. p. 23 (emphasis in original). The Board and Respondents clearly and unlawfully endorse the idea of bright line rules when it comes to rural densities. According to the Washington Supreme Court in *Thurston County* and *Viking Properties*, this bright line sought by KCC et al. does not exist.

C. Kittitas County provides for a variety of rural densities and protects rural character

CTED makes several bold and inaccurate statements that 1) Kittitas County's Comp Plan "contains few substantive provisions that circumscribe rural development" (CTED Br. p.23); 2) "Neither the land use element nor the rural element contain provisions that effectively contain or control rural development. . ." (CTED Br. p. 23); and 3) "there is nothing in the comprehensive plan that precludes three acre parcels . . . from being created in the rural area through site specific rezones, and nothing that would prevent all or most of the existing variety of rural densities from being lost." CTED Br. p. 13.

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Olympia, WA 98507
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First, these statements seem to suggest and/or assume that 3-acres defines the line not to be crossed, directly related to the first issue, discussed above. Second, as we have discussed before, the entire argument of Respondents on this issue seeks to unlawfully transfer the burden to Kittitas County when it comes to proving a variety of rural densities. Both the Board and KCC et al. continue to fall short of proving *actual violations* of the GMA. Finally, the statement ignores the detailed set of GPOs (Goal, Policy or Objective) that Kittitas County outlines in its Comprehensive Plan.

Kittitas County's Rural Lands Comprehensive Plan Chapter 8 is a detailed policy document that specifies at the outset that the County's rural land use designation "consists of a balance of different natural features, land use types and land uses. . . [t]he Rural Lands exhibit a vibrant and viable landscape where a diversity of land uses and housing densities are compatible with rural character." AR 213-14.

Specifically:

GPO 8.3 specifically contemplates the problem of "rural sprawl."

GPO 8.13 addresses the problem: "Methods other than large lot zoning to reduce densities and prevent sprawl should be investigated.

GPO 8.2 states "Projects and developments which result in the significant conservation of rural lands or rural character will be encouraged. AR 216-17.

GPO 8.46 specifies that "[r]esidential development on rural lands must be in areas that can support adequate private water and sewer systems."

8.49 states "[l]ot size should be determined by provision for water and sewer." AR 220-21.

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111 21ST Avenue SW
Olympia, WA 98507
Telephone (360) 352-7800

GPOs 8.48, 8.50 and 8.51 specify that PUDs and cluster developments are to be considered and also place safeguards for implementation of "innovative techniques." AR 221 (For example, "In the case of Planned Unit Developments (PUDs), only residential PUDs should be permitted outside of UGAs or UGNs.")

GPO 8.9 states that "[p]rojects or developments which result in the significant conservation of rural lands or rural character will be encouraged." AR 217.

In addition, despite the fact that Kittitas County's comprehensive plan included six rural areas with varying densities, Respondents continue to argue (and the Growth Board ruled) that the County's comprehensive plan did not provide for a variety of rural densities. *See* AR 2340-2347.

With all due respect to Respondent CTED, there is a simple disagreement about what is effective. It seems that Respondents would like a template comprehensive plan, drafted to their specific list of requirements. But this flies in the face of the local discretion afforded under the GMA itself. It is up to Kittitas County how they meet the requirements of the GMA as long as their actions are consistent with the GMA. *Thurston County,* 164 Wn.2d at 337, 190 P.3d 38. Futurewise and its allies may want certain rural areas protected in certain ways but local land use planning is not their exclusive prerogative.

Finally, on the subject of deference to counties planning under the Act, there may be a fundamental misunderstanding on the part of CTED, brought to light by a statement made by Respondents: "The notion of 'deference" is a shorthand reference to the presumption of compliance inherent in all standards of review." CTED Br. p. 32. This may be true, but the statement alone leaves an incomplete picture of the special kind of

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deference given to counties planning under the Act according to the substance and the structure of the GMA – as well as Legislative amendments and court decisions, discussed in detail at the beginning of this brief.

D. Kittitas County's Planned Unit Developments and Rural Clusters are exactly the kind of "innovative techniques" encouraged by the GMA

Like many counties, Kittitas chose to employ a variety of innovative techniques envisioned in the GMA to avoid undesirable land use patterns.

The GMA specifically suggests "innovative techniques" as a way to achieve a variety of rural densities:

> The rural element shall provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses. To achieve a variety of rural densities and uses, counties may provide for clustering, density transfer, design guidelines, conservation easements, and other innovative techniques that will accommodate appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character.

RCW 36.70A.070(5)(b).

Courts have also recognized these innovative techniques as a way to get around large-lot zoning and blanket minimum-acre-per-lot rules. See *Henderson v. Kittitas County,* 124 Wn.App. 747, 754, 100 P.3d 842 (2004), *review denied,* 154 Wn.2d 1028, 120 P.3d 73 (2005)

In the Kittitas County's Comprehensive Plan, GPOs 8.48, 8.50 and 8.51 specify that PUDs and cluster developments are to be considered and also place safeguards for implementation of such techniques. AR 221.

While KCC et al. claim that "Kittitas County cites to no innovative techniques it employed in its own planning process that would ameliorate the effects of three-acre

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111 21ST Avenue SW
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zoning," KCC et al. Br. p. 24. both the GPOs and accompanying ordinances lay out the design of the techniques and the cluster and PUD ordinances have protections in place to prevent urban-like development.

KCC et al. continue to argue that Kittitas County should have written its cluster development and PUD regulations in a certain way at a certain time with certain restrictions, without pointing to the provisions within the GMA that require such specifics. The fact is that Kittitas County's PUD and Cluster ordinances do include restrictions providing a variety of rural densities and protecting rural character.

As we pointed out to the Board, the GMA does not require these development regulations to be adopted simultaneously with the comprehensive plan. For local governments, the enactment of development regulations that are consistent with and implement the comprehensive plan is the final major step in GMA compliance. Just as the GMA provides a road map for this process, the Comprehensive Plan provides a road map for the development regulations.

Finally, the GMA explicitly grants local governments discretion when planning for growth and setting rural densities specifically. *See* RCW 36.70A.3201; *see also* RCW 36.70A.070(5)(b). KCC et al. fail to grant this discretion to Kittitas County once again by arguing that the possible densities allowed under these ordinances cross the line between urban and rural density.

III. CONCLUSION

At the conclusion of a read through the two briefs offered by Respondents KCC et al. and CTED, one is left with the distinct impression that the Respondents' wish is to have environmentalist attorneys travel around the state and draft Comprehensive Plans

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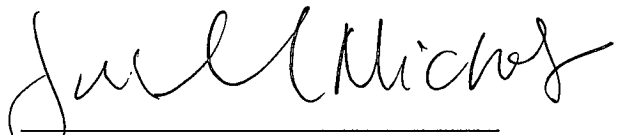
111 21ST Avenue SW
Olympia, WA 98507
Telephone (360) 352-7800

and Development Regulations. The deference to counties required under the GMA is ignored, and so are the local circumstances of a county such as Kittitas.

The GMA includes mandates and requirements – a "road map" for compliance – but the statute does not include a template comp plan with spaces to fill in the blanks. This was neither the intent nor the design of the GMA.

Respectfully submitted this 15th day of June, 2009.

CENTRAL WASHINGTON HOME BUILDERS ASSOCIATION, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, and MITCHELL F. WILLIAMS, d/b/a M.F. WILLIAMS CONSTRUCTION CO., INC.



Julie M. Nichols, WSBA # 37685
Timothy M. Harris, WSBA #29906
Attorneys for Appellant Building Industry Association of Washington
111-21st Ave SW
Olympia, WA 98507
(360) 352-7800